

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
December 18, 2007 Session

**STATE OF TENNESSEE v. JEFFREY RAY MCMAHAN**

**Direct Appeal from the Circuit Court for Sevier County**  
**No. 10065-III Rex Henry Ogle, Judge**

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**No. E2007-00037-CCA-R3-CD - Filed February 21, 2008**

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The defendant, Jeffrey Ray McMahan, was convicted by jury of one count of driving as a habitual motor vehicle offender (HMVO), driving while under the influence (DUI), fourth offense or greater, violation of the implied consent law, reckless endangerment, and disorderly conduct. The defendant was sentenced as a Range II, multiple offender. With the exception of disorderly conduct, the trial court ordered the defendant's convictions to run consecutively for a total effective sentence of twelve years. As his sole issue on appeal, the defendant challenges the trial court's imposition of consecutive sentences. After appellate review, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Ross Brent Gray (at trial and on appeal), Sevierville, Tennessee, and Charmaine Nichols (at trial), Knoxville, Tennessee, for the appellant, Jeffrey Ray McMahan.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Al Schmutzer, Jr., District Attorney General; and Johnnie D. Sellars, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTUAL BACKGROUND**

The following is a summary of the evidence presented at the defendant's trial. Crystal Franklin testified that on January 30, 2004, she and her husband, Jesse Franklin, were driving toward the top of Battle Hill in Sevier County, Tennessee when they came upon a vehicle in front of them. At the time, the vehicle was going extremely slow, about 10 miles per hour. Suddenly, the vehicle sped up significantly as it came over the top of Battle Hill. As Mrs. Franklin and her husband drove over Battle Hill, they observed that the vehicle had crashed off to the right side of the road with the

passenger side positioned towards a steep embankment. Mrs. Franklin called 911 while her husband went over to the crashed vehicle to help.

Mrs. Franklin testified that she observed the defendant “coming up from the driver’s side” of the vehicle. He was crawling up the hill from the vehicle. She also saw that two girls were sitting in the backseat, and a lady, later identified as Brenda Cox, was sitting in the front passenger seat of the vehicle. Mrs. Franklin was worried about the passengers because it appeared that the vehicle was being held by a metal guard rail post and could slide down the embankment at any moment.

Mrs. Franklin testified that she saw the defendant mumbling and stumbling around. He also kept leaning against the crashed vehicle despite warnings that the vehicle could slide over the embankment. Mrs. Franklin noted that the defendant was leaning on the vehicle while the other female passengers were still inside. Eventually, Ms. Cox and the two girls managed to get out of the vehicle. According to Mrs. Franklin, Ms. Cox’s head was bleeding. On cross-examination, Mrs. Franklin admitted that she never saw the defendant driving the vehicle.

Tony Watson testified that he worked as a paramedic for Sevier County. He also testified that he was a reserve deputy for the sheriff’s department in Sevier County. Mr. Watson recounted that he arrived at the scene of the accident on Battle Hill. Upon arrival, Mr. Watson observed that the crashed vehicle looked unstable as it was situated close to a steep embankment and held up by one of the guardrail posts. Mr. Watson treated Brenda Cox’s injuries. While doing so, the defendant voiced his desire to get into the vehicle in order to get his cigarettes. The defendant became belligerent when another fireman told him that it was unsafe to enter the vehicle. Mr. Watson stated that he attempted to calm the defendant down. Mr. Watson said that he explained to the defendant that he could not go back into the vehicle because it was unsafe and he could get injured. However, the defendant became loud and belligerent and began to cuss at everyone.

Mr. Watson testified that the defendant continued “raising Cain” about getting his cigarettes. Therefore, Mr. Watson told the defendant that he was a deputy sheriff and the defendant would be placed under arrest if he tried to re-enter his vehicle. However, the defendant did not listen, so Mr. Watson physically restrained him by placing handcuffs on him. According to Mr. Watson, the defendant smelled of alcohol, had bloodshot eyes, had slurred speech, was very belligerent, and was unsteady on his feet. At one point, Mr. Watson heard the defendant say, “You see, goddamn it, when you let me drive, you see what happens!” On cross-examination, Mr. Watson acknowledged that he learned the defendant had a prosthetic leg when he placed the defendant under arrest for disorderly conduct and moved him to the back of the police cruiser.

Mark Lipton testified that he was a deputy sheriff with the Sevier County Sheriff’s Department. When Deputy Lipton arrived at the scene, the defendant was already placed in handcuffs. Deputy Lipton noticed a smell of alcohol on the defendant’s person. The defendant was also belligerent and boisterous. Deputy Lipton asked the defendant to submit to a breathalyzer test. After being informed of the implied consent law, the defendant refused to take the test. Eventually,

the defendant was charged with various offenses including DUI. According to Deputy Lipton, the defendant admitted that he was the driver of the vehicle and that he was drunk.

The defendant testified on his own behalf. He admitted that he had a drinking problem and had been convicted numerous times for drinking and driving. On the day of the accident, he had been to court where he had been charged with public drunkenness and disorderly conduct. Also, he had been drinking on the day of the accident. However, the defendant asserted that he was not driving on the day of the accident. Instead, Brenda Cox, his girlfriend, was driving her vehicle when the accident occurred. According to the defendant, Ms. Cox drove her vehicle off the road because she could not see the road after a truck with bright lights passed. Ms. Cox ended up on the passenger side of the vehicle after helping the defendant get out of the vehicle with his prosthetic leg. The defendant stated that he did not want cigarettes, but he wanted to go back to the vehicle to get his crutches because he could not walk without his crutches.

The defendant testified that Deputy Watson kept accusing him of driving the vehicle even though he told Deputy Watson numerous times that Ms. Cox was driving. Finally, after the fourth or fifth time Deputy Watson accused him of driving, the defendant sarcastically responded, "If you say so." The defendant denied telling Deputy Lipton that he was the driver of the vehicle. He asserted that he had not driven a vehicle since his leg had been amputated in 2003. He reiterated that the vehicle was Ms. Cox's and that she was driving it when the accident occurred.

Brenda Cox testified that she was a good friend of the defendant. On the day of the accident she drove her two daughters to Gatlinburg and the defendant came along. Ms. Cox asserted that she drove her vehicle and the defendant sat in the front passenger seat. On the way back from Gatlinburg, she decided to take a back road. She was not familiar with the road and as she drove over a hill, a truck with bright lights came towards her. Ms. Cox recalled that she could not see and ran off the road, causing the accident. According to Ms. Cox, the vehicle was almost sitting on its side after it came to rest on the downward slope of the embankment. She was not wearing her seatbelt, and as a result, she fell on top of the defendant on the passenger side of her vehicle.

Tasha Cox testified that her mother, Brenda Cox, was driving on the day of the accident. The defendant sat in the front passenger seat. According to Tasha Cox, the accident happened after a truck with bright lights passed.

Crystal and Jesse Franklin were called to testify as rebuttal witnesses. Mrs. Franklin testified that prior to the accident no other vehicle passed going in the opposite direction. After calling 911, she observed that the defendant was the only person who had gotten out of the vehicle. The lady passenger was still sitting on the passenger side of the vehicle, and the two girls were still sitting in the backseat of the vehicle. Mr. Franklin testified that when he went over to the crashed vehicle to help, he observed the defendant crawling out of the driver's seat. The lady was sitting in the passenger's seat and the two girls were sitting in the backseat.

Following deliberation, the jury found the defendant guilty of driving as a habitual motor vehicle offender (HMVO), driving while under the influence (DUI), fourth offense or greater, reckless endangerment, and disorderly conduct.

### ANALYSIS

As his sole issue on appeal, the defendant challenges the trial court's order of consecutive sentencing. Specifically, the defendant argues that the imposition of consecutive sentencing violates *Blakely v. Washington*, 542 U.S. 296 (2004) and *Cunningham v. California*, 549 U.S. ---- 127 S.Ct. 856 (2007). The defendant also argues that the court did not make the requisite findings to support consecutive sentencing based on the defendant being a dangerous offender.

Upon review, we note that both this court and the Tennessee Supreme Court have addressed the applicability of *Blakely v. Washington* to consecutive sentencing. This court has consistently adhered to the view that the imposition of consecutive sentencing does not offend a defendant's Sixth Amendment rights as set forth in *Blakely* and its progeny. See, e.g., *State v. John Britt*, No. W2006-01210-CCA-R3-CD, 2007 WL 4355480, \*13 (Tenn. Crim. App., at Jackson, Dec. 12, 2007). *State v. Joseph Wayne Higgins*, No. E2006-01552-CCA-R3-CD, 2007 WL 2792938, at \*14 (Tenn. Crim. App. Sept. 27, 2007); *State v. Anthony Allen*, No. W2006-01080-CCA-R3-CD, 2007 WL 1836175, at \*2-3 (Tenn. Crim. App. June 25, 2007), *perm. app. granted* (Tenn. Oct. 15, 2007); *State v. Eric Lumpkins*, No. W2005-02805-CCA-R3-CD, 2007 WL 1651881, at \*12 (Tenn. Crim. App., at Jackson, June 7, 2007), *perm. app. granted* (Tenn. Oct. 15, 2007); *State v. Earice Roberts*, No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at \*12 (Tenn. Crim. App., at Jackson, Nov. 23, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005); *State v. Lawrence Warren Pierce*, No. M2003-01924-CCA-R3-CD, 2004 WL 2533794, at \*13-14 (Tenn. Crim. App., at Nashville, Nov. 9, 2004), *perm. app. denied* (Tenn. Feb. 28, 2005). In addition, our supreme court has noted that *Blakely* does not affect consecutive sentencing determinations. *State v. Robinson*, 146 S.W.3d 469, 499 n.14 (Tenn. 2004). Therefore, this issue is without merit.

We now turn to the propriety of consecutive sentencing in this case. A trial court may impose consecutive sentencing upon a determination by a preponderance of the evidence that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. Therefore, pursuant to this code section, a trial court may impose consecutive sentencing if it determines any one of the following criteria applies:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to

sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). The criteria are stated in the alternative; therefore, only one need exist to support the imposition of consecutive sentencing. However, if the trial court imposes consecutive sentencing based solely upon a finding that the defendant is a dangerous offender, the court must also determine whether the sentence imposed is reasonably related to the severity of the offenses and necessary to protect the public from further criminal activity by the defendant. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995). Additionally, the trial court should consider general sentencing principles including whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). It is within the sound discretion of the trial court whether or not to impose consecutive sentences. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

In ordering consecutive sentences, the trial court found the following:

Number one, that the defendant is an offender whose record of criminal activity is extensive, which is an understatement in this case; that the defendant herein is sentenced for an offense committed while on probation. The Court finds that this defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. In this particular case alone, he had three other people in the car he was driving. He has been convicted of multiple, multiple, multiple DUIs and has no hesitation about getting [behind] the wheel of a car and driving drunk. Now, even if that one does not apply under the facts of this case, the Court finds that the previous two, that it has found is more than enough to justify consecutive sentencing in this case. Therefore, the Court orders that the three felony convictions shall be served consecutively for a net sentence of 12 years . . . .

Regarding its finding that the defendant was a dangerous offender, the court elaborated:

[I]n this case, because of his continued persistent and consistent violation of the laws . . . general misbehavior on almost every day of his life, there's nothing that's got his attention, and to order this man released back into this community, I honestly don't know that I would sleep very well over that because our society is a victim waiting for him to run over. Now, that's just the bottom line of it. And so, he's going to serve this sentence, and I'm sorry for him. . . . [B]ut if we did anything else in this case it would be a miscarriage of justice. Justice generally means getting what you deserve taken with a dose of mercy, but he's had all the mercy the legal system can give him. And if he gets out and runs over and kills somebody else, where is the . . . justice.

We conclude that the trial court did not err in ordering consecutive sentencing. First, as the trial court noted, the defendant has quite a lengthy criminal history. Among the convictions cited in the defendant's presentence report are ten DUI convictions, nine public intoxication convictions, seven convictions for driving on a revoked license, four assault convictions, four convictions for evading arrest, three disorderly conduct convictions, three convictions for being an habitual traffic offender, two reckless driving convictions, two theft convictions, two convictions for failing to stop at the scene of an accident, one conviction for destruction of property, one conviction for resisting arrest, one conviction for telephone harassment, and one conviction for misdemeanor possession of marijuana. The presentence report also shows at least four violations of probation. These findings alone justify the court's imposition of consecutive sentencing. *See* Tenn. Code Ann. § 40-35-115, Sentencing Comm'n Comments. Additionally, it is our view that the court properly articulated its reasons for finding that the defendant was a dangerous offender, including why the sentences imposed reasonably relate to the seriousness of the offenses and are necessary to protect the public from further criminal activity by the defendant. As the court pointed out, the defendant continued to drink and drive despite multiple prior DUI convictions. He was given leniency in sentencing for his prior convictions, but he continued to violate the law. His continued criminal behavior endangered the lives of other motorists and reflect a total disregard for the safety of individuals in the community. Accordingly, we discern no error in the imposition of consecutive sentencing, and the defendant is not entitled to relief.

## **CONCLUSION**

Based upon the foregoing review, we affirm the judgments of the court.

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J.C. McLIN, JUDGE